(5)

SUPREME COURT OF THE UNITED STATES

JOSEPH P. MAZUREK, ATTORNEY GENERAL OF MONTANA *v.* JAMES H. ARMSTRONG ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1104. Decided June 16, 1997

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Court may ultimately prove to be correct in its conclusion that the Court of Appeals should have affirmed the District Court's refusal to preliminarily enjoin that portion of the statute disqualifying Susan Cahill from performing abortions in Montana. Nevertheless, I do not agree that this decision has sufficient importance to justify review of the merits at this preliminary stage of the proceeding. The background of the litigation and a comment on the Court of Appeals' discussion of legislative motive will help to explain why I am not persuaded that the Court's summary disposition is appropriate.

Since 1977, respondent Cahill, a licensed physician's assistant, has been performing first-trimester abortions in Kalispell, Montana, under the supervision of Dr. James Armstrong. She is the only nonphysician in Montana who performs abortions.

Since 1974, Montana law has provided that an abortion could be performed only by a licensed physician. See Mont. Code Ann. §50–20–109(1)(a) (1995). Because the term "licensed physician," as used in that statute was construed to include licensed physician assistants working under the direct supervision of a physician

6 pp

pursuant to a state approved plan,[1] it did not disqualify Cahill from continuing her work with Dr. Armstrong.

In 1995, the Montana Legislature enacted the statute at issue in this litigation. This statute banned physician assistants from performing abortions, provided that second-trimester abortions could only be performed in licensed hospitals, and prohibited any form of advertising of abortion services. See 1995 Mont. Laws, ch. 321. The record strongly indicates that the physician assistant provision was aimed at excluding one specific person—respondent Cahill—from the category of persons who could perform abortions. Although this is not apparent on the face of the statute, the parties agree that because Cahill is the only physician assistant who performs abortions in the State of Montana, she is the only person affected by the ban. Furthermore, the legislative hearings preceding the enactment of the statute contain numerous references to Cahill by name,[2] and the injunction against enforcement of this provision of the statute pending the appeal applies only to Cahill.[3]

---

[1] See *Doe* v. *Esch*, No. CV-93-060-FG-PGH (Nov. 26, 1993), App. to Pet. for Cert. 33a (enjoining State from enforcing the licensed physician provision against a physician assistant, supervised by a licensed physician, who has received approval from the State Board of Medical Examiners to conduct abortions); see also Mont. Code Ann. §37-20-403 (1993) (recognizing physician assistant as agent of the supervising physician); Mont. Code Ann. §37-20-303 (1995) (authorizing Board of Medical Examiners to approve physician assistant utilization plans detailing range of physician assistants' practice); *Armstrong* v. *Mazurek*, 906 F. Supp. 561, 564 (Mont. 1995) (noting that the Montana Board of Medical Examiners construed its authority to include approval of Cahill's utilization plan allowing her to perform first-trimester abortions).

[2] See Minutes of Committee on Public Health, Welfare & Safety, Montana Senate, 54th Legislature (Mar. 10, 1995), reprinted in App. to Pet. for Cert. 50a-60a.

[3] "1. The injunction shall apply only to Plaintiff Susan Cahill and will allow her to practice under those terms in *effect* prior to October 1, 1995. Plaintiff Cahill must be supervised by a licensed physician and shall operate under the physician assistant-certified

The likelihood that the legislature may have enacted the statute for the sole purpose of targeting Cahill is suggested by the fact that the other two provisions in the 1995 Act—the hospitalization requirement and the advertising ban—were clearly invalid because they were reenactments of two provisions that already had been held unconstitutional in earlier litigation,[4] and that the State, in this litigation, conceded to be unconstitutional.[5] This history, together with Cahill's claim that the same antiabortion groups who had repeatedly targeted Cahill and Armstrong's practice were the proponents of the 1995 legislation, provided the basis for Cahill's argument that the statute was invalid as a bill of attainder, as well as an undue burden on the right to an abortion.

The discussion of legislative motive in the opinion of the Court of Appeals was a response to two decisions of this Court that suggest that such an inquiry is sometimes proper. In determining whether the "requirements serve no purpose other than to make abortions more difficult," within the meaning of *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 901 (1992), the Court of Appeals looked to our recent decisions in *Miller* v. *Johnson,* 515 U. S. ___, ___ (1995), and *Shaw* v.

---

utilization plan previously approved by the Montana State Board of Medical Examiners that includes the performance of abortions pursuant to the provisions of Mont. Code Ann. Title 37, chapter 20. No other physician assistants-certified will be allowed to perform abortions in Montana under the terms of this stipulation or the Court's order." App. to Pet. for Cert. 32a.

[4]In *Doe* v. *Esch, supra,* the court enjoined enforcement of the hospitalization requirement, and in *Doe* v. *Deschamps,* 461 F. Supp. 682 (Mont. 1976), the court held that the advertising and solicitation prohibition were unconstitutional.

[5]Respondents challenged these two provisions—along with the ban on performance of abortions by physician assistants, and the State did not contest that it was bound by the prior judgments from enforcing these prohibitions. See 906 F. Supp., at 563.

Hunt, 517 U. S. ___ (1996).[6] Today, the Court ignores those cases, but concludes that the record is barren of evidence of any improper motive. As the discussion above indicates, this is not quite accurate; there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional. The statute removed the only physician assistant in the State who could perform abortions, yet there was no evidence that her practice posed any greater health risks than those performed by doctors with the assistance of unlicensed personnel. When one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive, see *id.*, at ___ (slip op., at 4–5), was to make abortions more difficult.

In any event, the Court of Appeals did not reach the constitutional issue that is presented by this litigation. The Court of Appeals simply remanded this action to the District Court because it found that the District Court had unduly confined its analysis of what constitutes an impermissible purpose. Although the parties stipulated to the entry of a limited injunction pending appeal that temporarily protects Cahill and no one else, there is no indication yet from either the District Court or the Court of Appeals that either a permanent or preliminary injunction will ever be entered against enforcement of the physician-only provision of the statute.

---

[6]The Court of Appeals reasoned: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.' *Miller*[, 515 U. S., at ___ (slip op., at 15)]. Such a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment. *Shaw*[, 517 U. S., at ___, ___ (slip op., at 3–6)]. A determination of purpose in the present case, then, may properly require an assessment of the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute in fact can be regarded as serving a legitimate health function." 94 F. 3d 566, 567 (CA9 1996).

As I read the decisions of the Court of Appeals and the District Court, this case involves an extremely narrow issue concerning the State's power to reduce by one the small number of professionals in Montana who can lawfully perform abortions in that State. I do not perceive the slightest threat to the 40 "physician only" laws cited at the outset of the Court's opinion, particularly since some of these States might allow licensed assistants to perform abortions under the supervision of a physician as was the practice in Montana prior to 1995.[7] Because physician assistants working under the supervision of a physician might be included in the definition of "physician," it is not clear at this stage that the Court of Appeals' decision challenges any of this Court's statements (for the most part dicta), *ante,* at 6, that a State may restrict the performance of abortions to physicians. I think the Court would be well-advised to await further developments in the case before intervening. Surely, the Court of Appeals' determination that a further inquiry into the facts is appropriate before making a final decision on the motion for a preliminary injunction does not provide a proper basis for summary action in this Court.

Having decided to take the case, however, it does

---

[7]Some of the States that have physician-only laws also have statutes that broadly define the medical duties that physicians can delegate to physician assistants. See, *e.g.*, Conn. Gen. Stat. §§20–12a, 20–12d (1997); Fla. Stat. Ann. §458.347 (Supp. 1997); Ill. Comp. Stat. Ann. ch. 225, §§95/1, 95/4(3) (1993 and 1997 Supp. Pamph.); Ind. Code §§25–27.5–5–2, 25–27.5–6–3 (1993); Iowa Code Ann. §§148C.1, 148C.4 (1989); La. Rev. Stat. Ann. §§37:1360.22(5), 37:1360.28, 37:1360.31.A(1), B (West Supp. 1997); Me. Rev. Stat. Ann., Tit. 32, §3270–A (Supp. 1996); Mass. Gen. Laws, §112:9E (1994); Neb. Rev. Stat. §71–1,107.17 (1996); R. I. Gen. Laws §5–54–8 (1995). My research indicates that Montana and California are the only States that explicitly prohibit physician assistants from performing abortions. See 74 Op. Cal. Atty. Gen. 101 (1991) (declining to construe the physician assistant statute to allow physician assistants to perform abortions).

seem to me that the Court should provide some enlightenment as to whether the Court of Appeals misread this Court's opinions in *Miller* and *Shaw* v. *Hunt*.

In my judgment, the petition for certiorari should be denied.